January 12, 1994

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

COUNCIL STAFF DOCKET MEETINGS

The City Manager's Council Liaison sent a memorandum on January 5 announcing a briefing schedule for Council staff discussion of the adoption portion of each week's Council agenda. A copy of the memorandum is attached. Although there may be considerable merit in the idea from an operational point of view, the problem is that there is a serious question whether Council staff docket briefings are subject to the open meeting requirements of the Ralph M. Brown Act, Government Code section 54950 et seq. I think it's important that you know about the problem, because a Brown Act violation can have significant legal effects.

The Brown Act requires that meetings of legislative bodies be conducted in public. Courts interpret the Act to require all deliberative processes by decision-making bodies, including discussion, debate and acquisition of information, be open for public scrutiny. Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 263 Cal. App. 2d 41 (1968). The Act applies to multi-member bodies such as councils, boards and commissions, because they are supposed to arrive at collaborative decisions through public discussions and debate. Open Meeting Laws, California Attorney General's Office (1989).

The Act provides limited exceptions to the general rule that meetings be conducted in public. Courts and the Attorney General construe these exceptions narrowly, giving broad interpretation to provisions that promote openness. Thus, board members may not cast secret ballots at a public meeting (68 Op. Cal. Att'y Gen. 65 (1985)) or go from one to another individually or in small groups (the so-called seriatim meeting --Stockton Newspapers, Inc. v. Redevelopment Agency, 171 Cal. App. 3d 95 (1985)) to evade the open meeting requirement. See also 65 Op. Cal. Att'y Gen. 63 (1982) and 63 Op. Cal. Att'y Gen. 820 (1980).

The Act applies to "legislative bodies" of California local agencies. A "local agency" under the Act means a city like ours: The City of San Diego is a "local agency" under the Brown Act.

Government Code section 54951. The Act defines "legislative body" in sweeping terms. City Councils are clearly included (Government Code section 54952), as are boards, committees and other multi-member bodies which exercise power delegated to them by legislative bodies (Government Code section 54952.2), and even advisory bodies to local agencies created by formal action (Government Code section 54952.3).

The question comes down, then, to whether regularly scheduled staff docket briefings, like those announced in the memorandum, fall under the Brown Act's terms, either as meetings of some sort of official body created by the Council or by virtue that they are an extension of the meetings of the Council, itself. While it's not entirely clear, we think the Brown Act applies to the staff docket briefings proposed.

There's only one case defining "formal action" for the purposes of the Brown Act. That's Joiner v. City of Sebastopol, 125 Cal. App. 3d 799 (1981), where the court held an interview committee established by the City Council was subject to the Act. It reasoned the Brown Act applied to the interview committee because the City Council created the committee by "formal action." The City Council took formal action in establishing the committee, the court ruled, because it "instigated" establishment of the committee, appointed two Councilmembers to it and adopted its agenda (that the committee would interview applicants and report back to the Council). The court added that the Brown Act's language announces a legislative intent that it be construed broadly to preclude evasion. Joiner at 805. The Joiner court also relied on an Attorney General's opinion, acknowledging that it was not bound by the opinion but stating that it is entitled to "great weight." Joiner at 804.

In another opinion, the Attorney General concluded an academic senate was formed by "formal action" of its district governing board (a legislative body for purposes of the Act) even though it was formed initially by a vote of the faculty, not the district governing board, because the board was required to "recognize" the senate. In addition, State law required the district board to establish procedures providing the faculty with a means by which to express its opinion. 66 Op. Cal. Att'y Gen. 252 (1983).

A little over a year ago, the Attorney General reaffirmed his opinion that the term "formal action" must be broadly applied to preclude evasion of the Brown Act. The Attorney General said the Act applies to student associations because the associations were created by "formal action" of the college district governing board, since the board authorized the organization of student

organizations, in the first place, and adopted some of the policies and procedures providing students the opportunity to participate in the management of the college. The Attorney General concluded these acts constituted "formal action" for purposes of the Act. 75 Op. Cal. Att'y Gen. 143 (1992).

The Attorney General does not restrict "formal action" to mean a legislative body must appoint members of a committee or take some other affirmative action for the committee to be subject to the Act. Therefore, if a court were to apply the Attorney General's logic to the facts before us, it is quite possible it might find meetings held on a regular basis for docket briefings are subject to the Act, since it may be inferred logically that the real reason for the docket briefing is to pass information from the Manager, via Council staff, to Councilmembers for their use in making subsequent decisions at formal Council meetings and that the Council, at least tacitly, approved the process.

But, whether or not you view a group of Council staff members as a "legislative body" for purposes of the Brown Act, there is the question of whether, as representatives of Councilmembers at regularly scheduled docket briefings, they act as the "alter egos" of their bosses. Staff members are government employees hired to assist members of legislative bodies. As such, they are admittedly distinct from the appointed or elected decisionmakers they serve. This distinction seems implicit in the Act, as staffs of legislative body members are not included in the definition of "legislative body." We haven't been able to find a California case or Attorney General opinion which has construed the term "legislative body" specifically to include staff. However, the Attorney General has issued an opinion which raises concerns about regularly scheduled Council staff docket briefings.

In his 1980 Opinion No. 80-713, the Attorney General concluded that members of a community redevelopment agency or their staff violated the Act by regularly meeting with the City Council and City Planning Commission in closed sessions to discuss agency business. There, the agency members and their staff met with small groups of the Council and Planning Commission to brief them on agency business. As "legislative bodies," the agency, Council and Planning commission members were subject to the Act. At no time was a quorum of any governmental body present at any given meeting. The Attorney General focused on whether these seriatim meetings violated the Act's requirements for notice and public input and concluded they did.

It's obvious that Council aides can act at times as the

functional equivalent or alter egos of their Councilmembers. When they do, Brown Act issues emerge. Moreover, courts have condemned "informal conferences," saying, for instance:

> In this area of regulation, as well as others, a statue may push beyond debatable limits in order to block evasive techniques. An information conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.
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> Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 263 Cal. App. 2d at 50 ┌emphasis addedσ.

Staff docket briefings can easily be viewed as a process where there is the "collective acquisition and exchange of facts preliminary to the ultimate decision." Sacramento Newspaper Guild at 47-48.

Regular or sanctioned meetings of City Council staff members invite inquiry as to whether the public's business is indeed being accomplished in public. We believe that conducting the scheduled Council staff docket meetings raises a serious issue of whether they fall under the Act. Accordingly, we recommend either (1) following the notice and open door provisions of the Act or (2) not holding such docket briefings at all.

Our view on this subject is admittedly conservative. We believe, however, it is the duty of an independent, elected municipal government legal advisor to be conservative, to protect the public treasury, the integrity of the governmental process and the right of the public to be informed.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachment
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